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Follow-up to the International Year of Older Persons: Second World Assembly on Ageing

Report of the Secretary-General

Summary

The present report is submitted in response to General Assembly resolution 71/164 on follow-up to the Second World Assembly on Ageing. It focuses on how older persons should be better taken into account in the implementation of the Sustainable Development Goals in the context of the 2017 theme of the high-level political forum on sustainable development of eradicating poverty and promoting prosperity in a changing world. The report provides an update on new initiatives to advance cooperation on ageing and the implementation of the Sustainable Development Goals. Conclusions and recommendations are also presented.

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I. Introduction

1. The present report is submitted pursuant to General Assembly resolution 71/164 on follow-up to the Second World Assembly on Ageing. It follows the previous report of the Secretary-General on the same subject (A/70/185), which gave an overview and analysis of how ageing and older persons fit within the newly adopted 2030 Agenda for Sustainable Development and its Sustainable Development Goals in the context of the further implementation of the Madrid International Plan of Action on Ageing, adopted in 2002. Since that time, the United Nations focal point on ageing, the Programme on Ageing of the Department of Economic and Social Affairs, has been exploring how the implementation of the Madrid Plan of Action and other relevant inputs, such as those arising from discussions within the General Assembly mandated Open-ended Working Group on Ageing, can contribute to the implementation of the 2030 Agenda and how older persons should be better accounted for in the implementation of its Goals.

2. The topic of the present report is addressed within the context of the theme of the 2017 high-level political forum of eradicating poverty and promoting prosperity in a changing world. The report also looks towards the 2018 theme of transformation towards sustainable and resilient societies and reviews at the global, regional and national levels to ensure that no one is left behind.

3. The report specifically focuses on the challenges to, and the interlinkages between, ageing and several key issues that underpin the Sustainable Development Goals, in particular the economic security and well-being of older persons, including income poverty, but also extending beyond that to encompass access to work and financial services, good health and long-term care. The cross-cutting issues of gender and age discrimination, which are key impediments to attaining economic security, are also discussed. The report further provides an update on United Nations system developments that are contributing to the age-inclusive implementation of the Goals and evidence-based policymaking in general, such as the latest efforts to improve the development and collection of age-disaggregated data. Finally, the report makes recommendations to advance the consideration of ageing and older persons in the further implementation of the Goals through age-inclusive approaches by all stakeholders, including the further implementation of the Madrid Plan of Action.

II. Income poverty in old age

4. Ending poverty in all its forms everywhere is central to the 2030 Agenda for Sustainable Development. The report on *Global Trends: Challenges and Opportunities in the Implementation of the Sustainable Development Goals 2017*¹ highlighted poverty as a critical area in which positive developments would radically enhance the prospects for achievement of the entire Agenda. The report also highlighted ageing as one of the megatrends that are likely to shape the prospects for achieving all of the Goals. As with other age groups, many older persons live in poverty and are denied a life of dignity. However, people living in areas where poverty is endemic, and having endured a life of poverty and deprivation, are often at greater risk of slipping deeper into poverty in their old age. Getting old presents a significant additional risk of vulnerability to economic insecurity, as well as poverty, with limited options for older persons to escape it.

¹ United Nations Development Programme (UNDP) and United Nations Research Institute for Social Development, *Global Trends: Challenges and Opportunities in the Implementation of the Sustainable Development Goals* (2017).

5. In many countries at all levels of development, older persons are at risk of falling into poverty, with a considerable number of low-income pensioners clustered just above the poverty threshold.² In fact, poverty in old age can be responsive to even slight changes in the poverty line. When the threshold is raised from \$1.90 per capita per day to the "moderately poor" threshold of \$3.10, the number of persons living in poverty globally more than doubles, indicating a high degree of vulnerability.³ Many older persons live in the gap between poverty and economic security, with incomes too high to qualify for public benefits because of eligibility requirements, yet too low to afford the daily expenses of living.⁴ Furthermore, the risk of poverty often increases with age. On average, the poverty level for persons over 75 years of age across Organization for Economic Cooperation and Development (OECD) countries is 14.7 per cent, which is 3.5 per cent higher than the poverty level among 66 to 75 year-olds.⁵ The "oldest-old", 80 years of age or over, are less able to work than younger older persons; are more likely to have spent their savings; and are most in need of age-appropriate health and long-term personal care services. Their numbers are growing fast, particularly in developing countries.⁶

6. Traditionally, families are perceived as a primary source of financial and personal support for older persons. While in some societies this is still true, the assumption that the informal support delivered by families will be adequate for the growing numbers of older persons throughout their old age is becoming less reliable and realistic. Increasing economic hardship leaves younger adults unable to provide adequate support for older persons. In fact, in some situations, the expectation of intergenerational solidarity has shifted, with older persons providing support to their families. In sub-Saharan Africa, older persons carry the burden of additional care responsibilities for orphaned grandchildren amid the increased mortality of working-age adults from the HIV and AIDS epidemic. In Lesotho, Malawi, Rwanda and Uganda, more than 20 per cent of adults over 60 years of age live in skipped-generation households.⁷ In some countries, there is growing evidence that points to an increased proportion of older persons living alone because of the tendency for families to be smaller, compounded by out-migration by younger family members. In China, for example, the number of older persons living alone is increasing rapidly in rural areas, because many adult children migrate to cities or distant places for work, often leaving older persons vulnerable to poverty without any or adequate family support and relying on farming for subsistence.⁸ This is evidenced by a 31 per cent increase in poverty rates for rural households of older persons living alone, when measured by pre-transfer income, and by a 15 per cent increase when measured by expenditure per capita, compared with older persons living with

² Organization for Economic Cooperation and Development (OECD), *In It Together: Why Less Inequality Benefits All* (Paris, 2015).

³ UNDP and United Nations Research Institute for Social Development, *Global Trends*.

⁴ Jan E. Mutchler, Yang Li and Ping Xu, "Living Below the Line: Economic Insecurity and Older Americans Insecurity in the States 2016", *Center for Social and Demographic Research on Aging Publications*, Paper 13 (2016).

⁵ OECD, *Pensions at a Glance 2015: OECD and G20 indicators* (Paris, 2015).

⁶ United Nations, Department of Economic and Social Affairs, Population Division, *World Population Ageing 2015* (New York, 2015).

⁷ Brittany McKinnon, Sam Harper and Spencer Moore, "The relationship of living arrangements and depressive symptoms among older adults in sub-Saharan Africa", *BMC Public Health*, vol. 13 (2013).

⁸ Sor Tho Ng, Nai Peng Tey and M. Niaz Asadullah, "What matters for life satisfaction among the oldest-old? Evidence from China", *PLoS One*, vol. 12, No. 2 (2017).

children.⁹ In India, however, over three quarters of the older population lives in three-generation households,¹⁰ which are well-suited to sharing resources and providing care for older persons, although that is not always the case.

Levels of poverty among older age groups

7. In addition to the gaps in availability of poverty data, which are largely due to insufficient funding and low capacity, household surveys collect information only from a single individual within a household and therefore may not accurately reflect the resources and needs of older household members. Given resource constraints in many countries, a pragmatic approach could be the extension of the existing household surveys. For example, Thailand provides ageing-related modules in its general household survey every four to five years.¹¹ However, a longer-term priority for developing and standardizing household survey tools to collect the missing information directly from older persons themselves is needed.¹² The lack of reliable and comparable data required to provide benchmarks and track progress towards eradicating poverty by 2030 for all social groups, as envisioned under the Sustainable Development Goals, is an obvious impediment to monitoring poverty.

8. Accordingly, the current picture of poverty in old age around the world is not clear. At the country level, it is difficult to make any inference about older persons as a group using sample-based household survey data. Comparing older persons in poverty across countries and regions becomes even more challenging when considering the differences in cost of living and the timing of when surveys are conducted. A person who is not considered to be living in poverty in one country may be considered as living below a minimum standard of living and counted among the poor in another country.

9. Currently, evidence of poverty among older persons is limited to selected country- or regional-level studies. According to recent estimates, the economic well-being of older persons differs quite markedly throughout the world, with relatively low rates of 2 per cent in the Netherlands in 2013, 3 per cent in Czechia in 2012¹³ and 11 per cent in Thailand in 2010.¹⁴ Other estimates reflect higher poverty rates of 34 per cent in Australia in 2012 and 50 per cent in the Republic of Korea in 2009.¹⁵ In Zambia in 2005 it was estimated that up to 80 per cent of older persons lived under the national poverty line.¹⁶ In addition to the limitations mentioned above, relatively lower poverty rates among older persons could also be attributed to age-related biases. For instance, older persons in deeper poverty tend to die earlier or, if less healthy, may reside in care centres and therefore not be captured in household surveys. Variations in poverty rates are largely due to differences in the coverage and adequacy of old-age social protection systems. For example, the poverty rate in

⁹ Albert Park and others, "Relying on Whom? Poverty and Consumption Financing of China's Elderly", *National Research Council (US) Panel on Policy Research and Data Needs to Meet the Challenge of Aging in Asia: Aging in Asia — Findings From New and Emerging Data Initiatives*, J.P. Smith and M. Majmundar, eds. (National Academies Press, Washington D.C., 2012).

¹⁰ Sonalde Desai and others, *Human Development in India: Challenges for a Society in Transition* (Oxford University Press, New Delhi, 2010).

¹¹ Ibid.

¹² See the concept note for a side event at the forty-eighth session of the Statistics Commission on "Exploring the case for a city group on ageing and age-disaggregated data". Available from <https://unstats.un.org/unsd/statcom/48th-session/side-events/20170310-1M-city-group-on-age-and-ageing-statistics>.

¹³ OECD, *Pensions at a Glance 2015*.

¹⁴ World Bank, "Reducing elderly poverty in Thailand: the role of Thailand's pension and social assistance programs", (Bangkok, 2012).

¹⁵ OECD, *Pensions at a Glance 2015*.

¹⁶ United Nations, *World Population Ageing 2015*.

the Republic of Korea may reflect that the country's pension system has not yet fully matured, whereas in Australia, the higher poverty rate may be because many pensioners have cashed in their pensions as lump sums, which are not counted as current income, rather than receive them in a series of periodic income payments.¹⁷ In some countries, the challenge will not be limited to providing the resources and services needed to raise older persons above the poverty line, but to ensuring that they remain out of poverty, especially in times of crisis.¹⁸

III. Key determinants of poverty and vulnerability in old age

A. Income

1. Pension coverage

10. The provision of pensions in old age is an effective and increasingly prevalent means of reducing poverty and income insecurity. Regular pension payments constitute or supplement older persons' income to cover basic needs such as food, housing and medical expenses. In some cases, they can also enable investment in livelihoods and help to build resilience against future shocks, such as an injury or a natural disaster. Social security is a right enshrined in international human rights law,¹⁹ yet nearly half of all persons above statutory pensionable age do not receive an old-age pension and, often, those with a pension receive too little in benefits to rise or stay above the poverty line. Those who lack pension access, and some who receive pensions that provide inadequate benefits, rely for income and other support on employment, family assistance and/or capital. Many are either in or are vulnerable to poverty, or are unable to make ends meet or at least to do so on a regular basis.

11. The importance of social protection to poverty reduction and well-being is increasingly recognized and reflected in laws and policies. In particular, under Sustainable Development Goal 1 on ending poverty in all its forms everywhere, Member States committed in General Assembly resolution 70/1 to implementing nationally appropriate social protection systems and measures for all and achieving substantial coverage of the poor and the vulnerable by 2030. A preliminary assessment of the third review and appraisal of the Madrid International Plan of Action on Ageing again underscored that, across regions, the issue of social protection for older persons continues to be a priority. Indeed, 166 of the 178 countries for which information is available provide old-age pensions through at least one type of social protection scheme, with many utilizing a variety of schemes (in the remaining countries, only lump-sum benefits are provided).²⁰ Among schemes that have achieved universal social protection for a vulnerable group, those providing pensions to older persons are the most common.²¹

12. The provision of pensions supports older persons themselves as well as their families and communities. Pensions constitute a predictable, long-term income

¹⁷ OECD, *Society at a Glance 2016: OECD Social Indicators* (Paris, 2016).

¹⁸ UNDP and United Nations Capital Development Fund, *Getting to the Last Mile in Least Developed Countries* (New York, 2016).

¹⁹ See article 22 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Economic, Social and Cultural Rights.

²⁰ International Labour Organization (ILO), *World Social Protection Report 2014/15: Building Economic Recovery, Inclusive Development and Social Justice* (Geneva, 2014).

²¹ World Bank, "World Bank, ILO announce new push for universal social protection", Press Release (21 September 2016). Available from <http://www.worldbank.org/en/news/press-release/2016/09/21/world-bank-ilo-announce-new-push-for-universal-social-protection>.

source that, at a minimum, reduces the degree of poverty experienced by an individual or their vulnerability to it and, in the best cases, provides for individuals' economic security and reduces intergenerational poverty.²² Regular cash transfers tend to improve consumption and even the use of health facilities among beneficiaries and their households, reducing monetary poverty and supporting good health and well-being.²³ Pension payments are sometimes used by older persons either directly or as collateral for credit to invest in subsistence or entrepreneurial activities²⁴ or in family members' education.²⁵ Investment by older persons in their or their families' businesses and skills builds productive capacity, which can reap dividends in the long term through improved livelihoods and resilience. Such consumption and investment can also fuel the local economy, which supports the livelihoods and well-being of others in the community.²⁶

13. At the global level, just 51.5 per cent of persons over pensionable age receive a pension.²⁷ Pension coverage varies significantly by region. In the regions of North America, Central and Eastern Europe and Western Europe, more than 90 per cent of older persons are covered. In Latin America and the Caribbean and in Asia and the Pacific, close to half of all older persons have pension coverage: 56.1 per cent and 47 per cent, respectively. Around one third, or 36.7 per cent, of older persons have coverage in North Africa and in the Middle East the coverage rate is 29.5 per cent. Sub-Saharan Africa has the lowest coverage, with just 16.9 per cent of older persons receiving a pension. While pension coverage largely corresponds to countries' level of income, informality of employment makes it challenging to collect contributions or tax payments for the financing of public pensions, affecting coverage rates. Many workers in the informal sector are therefore excluded from contributory pension schemes.

14. In the majority of OECD countries, public transfers comprise the majority of older persons' incomes.²⁸ Public pensions in these countries are most influential at the bottom level of income distribution, accounting for, on average, more than 80 per cent of the income of persons in the lowest four deciles.²⁹ Poverty rates are in fact lowest where coverage is widest and where public pensions account for the greatest share of older persons' incomes.

15. Some older persons are more vulnerable than others to income insecurity. Access to pensions and the security that they provide can be affected not only by the country in which a person lives, but by gender, area of residence and the intersection of these and other factors such as race or ethnicity and disability status.

²² HelpAge International, "Why social pensions?". Available from <http://www.helpage.org/meecc/about-us/why-social-pensions/>.

²³ Francesca Bastagli and others, *Cash transfers: what does the evidence say? A rigorous review of programme impact and of the role of design and implementation features*, (Overseas Development Institute, London, July 2016).

²⁴ Helmut Schwarzer, and Ana Carolina Querino, "Non-contributory pensions in Brazil: the impact on poverty reduction", ESS Paper, No. 11 (International Labour Organization Social Security Policy and Development Branch, Geneva, 2002). Available from http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---sec_soc/documents/publication/wcms_079061.pdf.

²⁵ HelpAge International, "Why social pensions?". Available from <http://www.helpage.org/meecc/about-us/why-social-pensions/>.

²⁶ Schwarzer Helmut Schwarzer and Ana Carolina Querino, "Non-contributory pensions in Brazil: the impact on poverty reduction", ESS Paper, No. 11 (Geneva, International Labour Organization Social Security Policy and Development Branch, Geneva, 2002). Available from http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---sec_soc/documents/publication/wcms_079061.pdf.

²⁷ ILO, *World Social Protection Report 2014/15*.

²⁸ OECD, *Pensions at a Glance 2015*.

²⁹ ILO, *World Social Protection Report 2014/15*.

Discrimination in access to education, the labour market and other opportunities accumulate over time and increase vulnerability. On average, older women fare notably worse than older men both in access to contributory pensions and in the level of benefits that these pensions provide. Women participate less than men in paid employment, spend more time away from paid employment owing to childbirth, often care for children or other family members who need it and tend to earn less than men while in employment. Over time, they contribute less to pension schemes and in turn receive lower payments in old age, despite having a longer life expectancy than men. For instance, in the European Union, where women's labour force participation is relatively high, the value of women's pensions is just 40 per cent that of men's pensions.³⁰ Disparities are also evident between rural and urban areas.³¹ To a large extent, rural economies, particularly in agriculture, are characterized by informal jobs and usually fall outside the scope of contributory pension schemes. Women and older persons are disproportionately represented in many rural areas across countries, as men and young people are more likely to migrate to urban centres seeking higher-wage jobs.

16. Of 178 countries analysed by the International Labour Organization, 78 have available contributory schemes only, and another 78 have available a combination of contributory and non-contributory schemes.³² Non-contributory schemes are either means-tested (requiring proof of need and targeting older persons whose income and/or assets are below a set threshold) or universal, with the latter being the only type of pension available in nine countries. As contributory pension programmes typically cover only workers in the formal sector and, in some cases, some groups of self-employed workers, government-financed non-contributory, or "social", pensions can achieve both broader and more equitable coverage. Given that they are not tied to work, social pensions do not reflect the various forms of discrimination that occur in employment, such as the occupational segregation that disadvantages women and certain racial or ethnic groups and the average lower wages that they and other vulnerable groups tend to receive. Accordingly, social pensions serve to reduce and prevent poverty and income insecurity as well as inequalities.

17. In recent years, many countries have moved to expand contributory pension programmes and, especially in Latin America,³³ to put in place social pension schemes.³⁴ Greater numbers of informal sector workers in particular are gaining coverage and Brazil, for instance, is among a number of countries that are taking measures to include agricultural and rural workers in contributory pension schemes. Moreover, following similar measures by some other countries and areas of sub-Saharan Africa, the Government of Kenya announced that it will provide a universal pension to all older persons over 70 years of age beginning in 2018.³⁵ That said, however, many countries have been undertaking pension reforms in the context of population ageing with the aim of ensuring the sustainability of pension systems. Additionally, numerous developed and developing countries continue to cut expenditures or to feel the impacts of austerity measures taken since 2010 and the

³⁰ United Nations Entity for Gender Equality and the Empowerment of Women, "Protecting women's income security in old age: toward gender-responsive pension systems", Policy Brief, No. 3 (UN-Women, New York, 2015). Available from www.unwomen.org/en/digital-library/publications/2015/12/women-income-security-in-old-age.

³¹ ILO, *World Social Protection Report 2014/15*.

³² Ibid.

³³ OECD, Inter-American Development Bank and World Bank, *Pensions at a Glance: Latin America and the Caribbean* (Paris, 2014).

³⁴ ILO, *World Social Protection Report 2014/15*.

³⁵ HelpAge International, "Kenya to launch universal pension scheme in January 2018", 31 March 2017. Available from www.helpage.org/newsroom/latest-news/kenya-to-launch-universal-pension-scheme-in-january-2018/.

second phase of the global economic crisis.³⁶ Pension reforms, ranging from stopping indexation to wages and/or prices to increasing the pensionable age, were the fourth most common adjustment between 2010 and 2013. Many such reforms risk worsening old-age poverty and insecurity as they fail to guarantee minimum benefits and reduce the purchasing power of pensions.

18. In the absence of pension access, older persons cannot exercise the right to retirement and must work until they are no longer able to do so.

2. Access to decent work and employment

19. Decent work has long been recognized not merely as a source of regular income, but as an individual's livelihood and means of social integration. In bringing decent work to the forefront of the 2030 Agenda, Goal 8 (to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all), provides a renewed incentive to address some of the root causes of poverty and inequality. A fundamental precondition for the reduction of poverty in old age is to adapt labour markets to accommodate and better meet the needs of the older population in all its diversity. This is particularly important given that, in 2014, the share of the world's workforce comprising older workers aged 55 or above expanded to an unprecedented 14.3 per cent. By 2030, the number of older workers is likely to increase to almost 750 million, which translates into more than 18 per cent of the total labour force.^{37,38}

Labour force participation rates by sex and age group in selected regions, 2016, and percentage change since 2012

Region	Age 55-64		Age 65 and over	
	2016	Change since 2012 (percentage)	2016	Change since 2012 (percentage)
<i>Male</i>				
Africa	80	1	53	0
Asia and the Pacific	74	-4	36	-3
Central and South-Eastern Europe (non-European Union) and Commonwealth of Independent States	62	4	13	-2
Developed economies and Europe	67	0	13	-3
Latin America and the Caribbean	77	-1	33	-5
Middle East	65	4	27	0
<i>Female</i>				
Africa	56	-1	34	1
Asia and the Pacific	47	8	20	6

³⁶ ILO, *World Social Protection Report 2014/15*.

³⁷ ILO, *World Employment and Social Outlook: Trends 2015* (Geneva, 2015).

³⁸ In 2017, the labour force worldwide comprises 3.5 billion people, projected to increase to 4 billion by 2030, and the average age of the global labour force is 39.2 years, up from 35.5 years in 1990, and is projected to rise to 40.5 years by 2030.

Region	Age 55-64		Age 65 and over	
	2016	Change since 2012 (percentage)	2016	Change since 2012 (percentage)
Central and South-Eastern Europe (non-European Union) and Commonwealth of Independent States	38	3	7	-1
Developed economies and Europe	52	1	7	-1
Latin America and the Caribbean	48	4	14	-2
Middle East	4	-5	11	8

Source: Calculated from International Labour Organization, *Key Indicators of the Labour Market*, 9th edition, available from www.ilo.org/kilm.

20. In 2016 (see table), Africa had by far the highest proportion of economically active workers among the age group 65 years and over (53 per cent for men and 34 per cent for women), while Europe and other developed economies had the lowest (13 per cent for men and 7 per cent for women). Between the two extremes, labour force participation rates among older persons were high in Asia and the Pacific followed by Latin America and the Caribbean then the Middle East. Relatively higher labour force participation rates among older workers aged 65 years and over in developing countries often reflect high levels of poverty and absent or inadequate social protection and, therefore, the need for older persons to continue to participate in income-generating activities to earn or supplement the income necessary to meet their basic needs. Gender gaps are found to persist in the labour market, where lower participation rates for older women (65 and over) followed a similar pattern across all regions. However, the discrepancy between developed and developing countries was much smaller for women than for men, with African and European women aged between 55 and 64 years of age showing similar levels of economic participation at 56 and 52 per cent, respectively.

21. Labour market information and analysis of workers aged 55 to 64 years is essential for addressing attitudes towards retirement and the availability of social protection. Recent figures (see table) show that the steady upward trends in the labour force participation of both male and female workers between 55 and 64 years of age in Europe from 2000 to 2012 (6 and 12 percentage points respectively) (see A/68/167) have reached a plateau, with no change in the employment rate of older men between 55 and 64 years of age, and only a 1 percentage point increase for older women within that age group from 2012 to 2016. Although the situation is not clear, indications are that this could be attributed in part to a range of barriers to achieving employment security that are related to age, foremost among which is discrimination based on stereotypes about the cognitive and physical limitations of older workers. In recent years, many developed countries have taken measures to facilitate and support the participation of older persons in the labour force. In 2015, a set of policy guidelines for encouraging and supporting employment at an older age were prepared and adopted as the OECD Recommendation of the Council on Ageing and Employment Policies. The recommendations called for enhancing incentives to continue working at an older age by rewarding later retirement and encouraging more flexibility in work-retirement transitions that permit a combination of pensions and work income. The recommendations further addressed the measures needed to combat age-based discrimination in employment, including

legislation and public-awareness campaigns to eliminate discrimination in the recruitment, promotion and training processes and in employment retention.³⁹

22. In developing countries, where half to three quarters of non-agricultural employment is in the informal economy,⁴⁰ employment challenges and priorities continue to give little consideration to the situation of older persons. Large numbers of older workers, especially illiterate and unskilled workers, engage in informal, rural occupations and sometimes in precarious and poorly paid work with limited access to pensions and affordable health-care coverage. Strengthening policies to extend the working lives of existing formal sector workers, where appropriate, and to provide social protection to all older persons in both the formal and informal sectors in these countries is key to ensuring that people do not slip below the poverty line in old age. China's expansion of coverage since 2010 for informal sector workers is particularly noteworthy, as it is the single biggest increase in the number of contributors to a government pension system in history. The scheme is also unique in its design, as it links contributions both to eligibility for a basic pension at age 60 and to immediate benefits for the elderly parents of contributors.⁴¹

3. Access to and use of financial services

23. Access to savings accounts, loans, insurance and other financial services can help people increase and smooth their consumption, save and transfer money, start or expand a business, plan for and manage risks and shocks, invest and otherwise both build and manage their income and wealth. For persons living in poverty, access to savings accounts alone can increase savings, consumption, productivity, empowerment among women and investment in preventive health care.⁴² Broadening participation in the financial system by individuals and businesses further boosts economic growth. Yet older persons face distinct challenges in gaining access to and utilizing financial services and products.⁴³

24. In 2014, 62 per cent of adults worldwide had an account at a bank or other financial institution or with a mobile money-service provider.⁴⁴ This represents an increase of 11 per cent since 2011, but indicates that 2 billion adults remain unbanked. In addition, 7 per cent fewer women than men have an account. Although there is limited comparable data specific to older persons' access to and use of financial services, existing evidence points to common barriers faced by older persons. In many countries, older persons lack financial literacy and awareness of how they can benefit from financial services. This situation may also apply to younger persons, such that planning for financial security in old age does not begin early in life. Moreover, trust in financial institutions may be low, particularly when it comes to micropensions for low-income people, who may lack confidence that their savings will in fact be accessible when they reach old age. Poor financial infrastructure often further hinders access to services, particularly for older persons with limited mobility and in rural areas.

³⁹ Available at www.oecd.org/els/emp/Ageing-Recommendation.pdf. Accessed on 20 June 2017.

⁴⁰ UNDP, *Human Development Report 2014, Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (New York, 2014).

⁴¹ World Bank, *Live Long and Prosper: Aging in East Asia and Pacific* (Washington, D.C., 2016).

⁴² Adolfo Barajas, Martin Čihák and Ratna Sahay, "A broader reach", *Finance and Development*, vol. 54, No. 1 (March 2017).

⁴³ HelpAge International and the Center for Financial Inclusion, *Aging and Financial Inclusion: An Opportunity* (2015).

⁴⁴ Asli Demirgüç-Kunt and others, "Global Findex database 2014: measuring financial inclusion around the world", Policy Research Working Paper, No. 7255 (World Bank, Washington, D.C., April 2015). Available from <http://documents.worldbank.org/curated/en/187761468179367706/pdf/WPS7255.pdf#page=3>.

25. Age discrimination and exploitation are additional impediments to older persons' use of financial services and their financial security. Legal protection of equality and non-discrimination on the basis of age remains lacking. Many older persons are otherwise denied access to credit by financial service providers or moneylenders because of ageist assumptions that older persons are unable to generate the income needed to repay loans. One study conducted in Europe found widespread discrimination in access to mortgages, loans and insurance.⁴⁵ Some banks restrict access to long-term loans and mortgages by persons above a certain age threshold, while insurance companies often provide limited coverage to persons above a certain age and require high surcharges and penalties from them, in some cases not even permitting older persons to buy certain policies. These practices may increase older persons' vulnerability to, for instance, inadequate housing and health insurance. In developing countries, older persons have also frequently been denied small business loans and microfinance services owing to their age. Across countries, ageist attitudes on the part of service providers may further impede older persons' use of services. The increased risk of reduced physical and mental capacity that accompanies advancing age also has important implications for many older persons' use of financial services. Such reduced capacity puts affected older persons at greater risk of financial abuse, including theft, being denied access to funds, or misuse of a power of attorney.

26. Some Governments and financial service providers, particularly in developed countries, are employing a range of age-friendly measures to facilitate older persons' financial inclusion and security. Laws and policies are gradually being put in place and strengthened to protect older persons from financial exploitation, with training provided to staff of private financial institutions to identify and prevent such abuse. Private micropensions are facilitating long-term saving for pensions for those with very low incomes and convenient points of service are also being set up to support voluntary contributions to contributory public pension systems. Banks are putting in place age-friendly features and services, including voice-enabled automatic teller machines for people with visual impairment and voice recognition to eliminate the need to recall passwords for persons with dementia, assistance with online account access and financial advice and services adapted to the diverse experiences of old age. Some Governments and organizations are additionally encouraging the habit of long-term saving to the extent possible throughout the life course.

B. Health status and access to quality and affordable health care

27. Although poverty and vulnerability are often measured or assessed in terms of income or wealth, they may encompass or be influenced by other factors. Health is fundamentally linked to common experiences of poverty; in fact, poverty and poor health tend to accompany each other. Poor health is often an outcome of income poverty or vulnerability, brought about by the lack of means with which to obtain or sustain adequate nutrition and to have access to clean water, sanitation and preventive, curative and rehabilitative health care and by living or working in environments that are unclean and physically or environmentally unsafe. Limited access to quality education and information and a lack of voice, which may also be viewed as aspects of poverty, can reinforce unhealthy practices and barriers to social services to the detriment of health status. At the same time, poor health also often

⁴⁵ AGE Platform Europe, *Background Document for Hearing "Unblocking the Anti-Discrimination Directive" on Age Discrimination in Access to Financial Services* Brussels: AGE Platform Europe (20 March 2012). Available from www.age-platform.eu/images/stories/Background_document_anti-discrimination_directive_AGE.pdf.

leads or contributes to income poverty and vulnerability when it limits a person's productive capacity or when the costs of treating or caring for the condition(s) do not allow, or significantly restrict the ability of, that person to meet other basic needs. Older persons are particularly vulnerable to poor health and income poverty because of their declining means with which to produce income, cumulative disadvantage and certain increased health risks associated with advancing age. Those already living in poor health and in poverty are least resilient to financial, environmental, conflict-related or other shocks.

28. Most older persons will at some point experience multiple health difficulties.⁴⁶ Yet the likelihood of this occurring, its pace and severity vary significantly. Although some individuals require assistance with daily activities in their mid-60s, others remain active and independent into their 90s. On average, older persons are more likely to experience multiple chronic conditions at the same time and to have greater health-care needs than other age groups. Still, many older persons are able to maintain good functional ability and well-being despite having one or more conditions. For others, however, health problems affect their livelihoods; poor health and disability are often the primary reasons for which older persons cut back on or withdraw from work. In fact, there is no clear evidence that people experience increased longevity while in good health. Older persons' greater vulnerability to health challenges underscores the importance of having access to affordable and quality health care in order to prevent and minimize the effects of diseases and injuries without undermining economic security and dignity.

29. Diversity characterizes older persons' health status and capacities.⁴⁷ While some of this diversity is due to individuals' genetic backgrounds and to the choices that they make, much of it is determined by the natural and physical environment in which they live and by individual characteristics such as gender, race or ethnicity, education, occupation and income. Disparities in health outcomes and access are thus often associated with socioeconomic status and identity. They reflect the cumulative impact of economic and other types of disadvantage experienced by excluded groups throughout the life course. Older persons who are excluded and those in poverty experience greater exposure to health risks, more health challenges and less access to health-related services. For instance, socioeconomic status influences decline in cognitive functions, multimorbidity and frailty,⁴⁸ while chronic illness and disability is more likely to affect older women than older men.⁴⁹

30. Access to health care remains out of reach or limited for many older persons. Cost and transportation are barriers to care everywhere but are especially problematic in low- and lower-middle-income countries.⁵⁰ Older persons often lack health insurance or adequate levels of health insurance or universal coverage, and out-of-pocket health care expenses can quickly become burdensome and even push people into, or further into, poverty, particularly those without pensions or with low levels of pension benefits and income from other sources. Studies on the impact of cash transfers in Ethiopia, Mozambique, the United Republic of Tanzania and Zimbabwe show that cash transfers received by older persons are indeed used for transportation to medical facilities, fees for health-care consultations, treatment medications and health insurance, in addition to food, sanitation and other things

⁴⁶ World Health Organization (WHO), *World Report on Ageing and Health* (Geneva, 2015).

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ HelpAge International, "Health and care policy". Available from <http://www.helpage.org/what-we-do/what-we-do/health/health-policy/>.

⁵⁰ WHO, *World Report on Ageing and Health*.

that contribute to overall health and well-being.⁵¹ Women's average longer life expectancy and average greater economic insecurity make them especially vulnerable to unmet health needs and other deprivations as a result of prohibitive medical costs. Accessibility of health facilities is also a challenge for many older persons, particularly in rural and remote areas where medical centres are located at significant distances from homes and where health and transportation infrastructure and options are lacking, require fees that are unaffordable or poorly serve persons with limited mobility.

31. Healthy ageing aims to build and maintain capacity and resilience, to reverse, stop or slow the loss of capacity as it occurs and to compensate for the capacity that is lost.⁵² This approach to ageing encompasses prevention and limiting risk factors, practical means to extend good health and supportive environments to minimize and respond to declining health. With a focus on resilience, strategies to promote healthy ageing can reduce older persons' vulnerability to illness and injury and increase their capacity to prepare for and cope with other shocks.

32. Measures to promote good health can enable older people to avoid poverty or to ease its effects, while measures to address poverty are likely to support good health. Yet interventions must aim not only to provide relief from deprivation, but maintain the conditions and practices that enable good health and economic security. Some of the ways in which Governments can promote the health and resilience of older persons and also reach those most in need are the provision of universal health coverage with targeted benefits to older persons and marginalized groups; a life-course approach to public health that addresses disparities across social groups; eliciting the participation of older persons and ageing-focused civil society groups in decision-making; and strengthening cohesion across health and social services to foster comprehensive care.⁵³

Long-term care and vulnerability to poverty

33. Older persons in need of care can become vulnerable to poverty and economic insecurity as a result of out-of-pocket payments for in-home and institutional care. Vulnerability can nevertheless arise even for older persons in receipt of no-fee family care when a caregiver has to reduce his or her working hours or withdraw from the labour market and the family unit as a whole suffers. For the majority of older persons who want, or even have, access to any type of formal care services, they must utilize savings or instead "spend down" their assets to qualify for government-funded institutional or in-home services.

34. Often, different Government funding mechanisms and qualifying rules exist for social and medical in-home care services, with more burden being put on the individual to self-fund social care that supports the activities of daily living. Such out-of-pocket expenditures can have adverse financial outcomes for both the older persons themselves and, often, their families. While a limited market exists in some developed countries for self-insurance policies against possible long-term care costs in the future, the take-up rate is low and policy premiums are expensive. The policies therefore tend to be affordable only for those with extensive resources.

35. The United States Treasury Department recently explored the ability of households to finance formal care needs, in particular for older women, who live

⁵¹ Bastagli and others, *Cash transfers: what does the evidence say?*; and HelpAge International and Age International, *Cash Transfers and Older People's Access to Healthcare: A Multi-country Study in Ethiopia, Mozambique, Tanzania and Zimbabwe* (HelpAge International, London, 2017).

⁵² WHO, *World Report on Ageing and Health*.

⁵³ Ibid.

longer and spend more years in need of care assistance. They looked at various segments of the older female population and the extent to which they could finance formal long-term care out of income, non-housing liquid assets and total wealth, including housing, at different points of the income/wealth distribution. They found that disability later in life can have an enormous impact on economic security, given the limited resources many women have with which to finance formal care, to the extent that only relatively wealthy older women were able to finance long-term care over an extended period. The older the woman (80 and above), the less ability there is to pay the full cost of care. Those living on low incomes as they approach old age are unable to self-finance any type of long-term care and become reliant on what State aid is available. This is partly why a number of Member States, including Germany, Japan, the Netherlands and the Republic of Korea, have instituted mandatory public long-term care insurance schemes.⁵⁴

36. In developing countries without extensive State-provided services or funding, the example of South-East Asia is cited as best practice for finding low-cost alternative care services to ever-shrinking family care capacity. Older persons associations are developing a holistic community-care approach to support the increasing numbers of older people who are highly dependent and need help with day-to-day activities, have a limited income and lack adequate care from their families. These activities include recruiting, training and managing home-care volunteers from the community to provide personal-care assistance to older people who need it. The associations can also help pay for transportation to health stations when required and offer links to complementary services, such as those that provide assistive devices or rehabilitation. This type of model helps older persons to avoid the multiple financial and health-related vulnerabilities that lead to poverty.⁵⁵

IV. New initiatives to advance cooperation on ageing and the implementation of the Sustainable Development Goals

37. Since 2002, when the Madrid International Plan of Action on Ageing was adopted, both it and a number of General Assembly resolutions have raised awareness of the importance of age-disaggregated data for evidence-based policymaking. The Sustainable Development Goals have re-emphasized the issue and sought to refocus the efforts of Member States, the United Nations system and other stakeholders to prioritize it at all levels. As a result of a side event held during the forty-eighth session of the Statistical Commission, in March 2017, a stakeholder group was established comprising interested national statistical offices, United Nations system organizations and an international non-governmental organization on the creation of a city group on ageing and age-disaggregated data. The item will be included in the provisional agenda of the forty-ninth session of the Statistical Commission, to be held in 2018. To further this work, a workshop was held from 22 to 24 August 2017, hosted by the United Kingdom Office for National Statistics, with key stakeholders to share knowledge on the core issues of age-disaggregated data and ageing statistics — along with the Group's objectives, proposed activities, expected outcomes and membership.

38. With seed funding from the United Nations Development Account, the Department of Economic and Social Affairs is implementing a pilot project, a multiple indicator survey on ageing in sub-Saharan Africa. With the participation of the Government of Malawi, the first ever, nationally representative survey took

⁵⁴ United States Treasury Department, Office of Economic Policy, "The economic security of older women", *The Economic Security of American Households, Issue Brief Three* (January 2017).

⁵⁵ WHO, *World Report on Ageing and Health*.

place in that country in mid-2017. It will provide information on many indicators of the physical, psychological, social, economic and environmental situation of older persons. The survey sought to enhance knowledge about the situation of older persons and ageing in Malawi and its results will contribute to an evidence base that is greatly needed to facilitate policy and planning aimed at responding to the opportunities and challenges of population ageing. The national statistical office piloted the multiple indicator survey on ageing in Malawi and it is hoped that, with further funding, the survey can be replicated in Kenya, Uganda and other countries. The findings of the pilot study will validate the methodology and tools used for assessing the situation of older persons, with the possibility of prompting the launch of multi-country studies across sub-Saharan Africa.

39. An informal network of interested entities of the United Nations system has been launched by the Department of Economic and Social Affairs and the United Nations Development Programme to exchange and discuss information on ageing-related work and identify areas of cooperation and synergies; raise the profile of ageing issues; integrate ageing and older persons into the implementation of the 2030 Agenda for Sustainable Development within the context of its focus on leaving no one behind; and systematically integrate the concerns and interests of older persons into the work of the group. Current partners within that network include the United Nations Population Fund, the Office of the United Nations High Commissioner for Human Rights, the United Nations Research Institute for Social Development, the International Labour Organization, the United Nations Entity for Gender Equality and the Empowerment of Women, the World Health Organization and the Economic and Social Commission for Western Asia, with other entities likely to join in the future.

V. Conclusions and recommendations

40. As Member States and the United Nations system work on the implementation of the Sustainable Development Goals and the inclusion of largely overlooked social groups, the interlinkages among the Goals has brought about discussion and action on cross-cutting issues such as ageing. While it is true that older persons are traditionally included under the social protection debate when issues of poverty eradication are raised, acknowledgement of the multidimensional nature of poverty and the Goals has enabled greater recognition of the effects of population ageing in many other areas of the development agenda. This also implies that, in addition to taking into account the vulnerabilities of old age, the development potential of older persons must be recognized and seized upon.

41. While these issues are at the heart of the Madrid International Plan of Action on Ageing (2002), the Sustainable Development Goals have jump-started areas of cooperation between Member States and the United Nations system, for example on the issue of enhancing improved age-disaggregated data production and analysis, and inter-agency work on cross-cutting issues.

42. Member States may wish to:

(a) Take into account the multidimensional nature of older persons' vulnerability to poverty and economic insecurity, including through the promotion of good health, care and well-being, in their implementation of the Sustainable Development Goals at the national level;

(b) Support the development of improved age-disaggregated data and welcome the inclusion of the topic of ageing and age-disaggregated data in the agenda of the Statistical Commission;

(c) Continue to support the integration of issues relating to ageing and older persons into the wider development agenda in the implementation of the Goals;

(d) Continue to expand the reach of pension schemes, including social pensions, and to increase their benefits towards ensuring income security in old age;

(e) Intensify efforts to eliminate age-based and other forms of discrimination in employment, social protection and the provision of social services.



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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights and transnational corporations and other business enterprises

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolutions 17/4 and 35/7.

* A/72/150.



Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Summary

In the report, the Working Group on the issue of human rights and transnational corporations and other business enterprises unpacks the concept of access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. It clarifies the interrelationship between the right to effective remedy, access to effective remedy, access to justice and corporate accountability. It examines the issue of effective remedies from the perspective of rights holders and proposes that remedial mechanisms should be responsive to the diverse experiences and expectations of rights holders. Affected rights holders should be able to claim what may be termed a "bouquet of remedies" without fear of victimization.

The Working Group also outlines what may be termed as an "all roads to remedy" approach to realizing effective remedies, which implies that access to effective remedy is taken as a lens to guide all steps taken by States and businesses and that remedies for business-related human rights abuses are located in diverse settings. The report ends with specific recommendations to States, business enterprises, civil society organizations and human rights defenders.

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I. Introduction

A. Backdrop

1. In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises sets out what an effective remedy means under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework so as to ensure that rights holders are at the heart of remedies. The Working Group also outlines what may be termed as an "all roads to remedy" approach that should inform the action of all relevant stakeholders to realize effective remedies for those affected by business-related human rights abuses.

2. There is a close relationship between rights and remedies.¹ If a human right is breached, the holder or holders of the right should be able to seek remedies from the duty bearers. The remedies should be effective, lest rights mean little in practice. Accordingly, the "right to an effective remedy for harm is a core tenet of international human rights law".² Access to effective remedy is also a core component of the Guiding Principles. Guiding Principle 1 requires States to take "appropriate steps to prevent, investigate, punish and redress" business-related human rights abuses within their territory and/or jurisdiction. Guiding Principle 22 provides that, where "business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes". The foundational principle of pillar III, on access to remedy, Guiding Principle 25, reminds States to "take appropriate steps to ensure" that those affected by business-related human rights abuses within their territory and/or jurisdiction "have access to effective remedy".

3. Although several effectiveness criteria for non-judicial grievance mechanisms are stipulated in the Guiding Principles, there is no explanation of what amounts to an effective remedy. While there is a close correlation between the effectiveness of a remedial mechanism and obtaining an effective remedy,³ these are two separate aspects, because an effective process may not always result in an effective outcome. Accordingly, there is scope to provide guidance on the concept of an effective remedy irrespective of the type of mechanism employed by rights holders to seek redress. The Working Group aims herein to provide such guidance.

4. National action plans are a key tool for the implementation of the Guiding Principles, including access to remedy provisions under pillar III. In its guidance on national action plans on business and human rights, the Working Group outlines potential measures that States can take to improve access to effective remedies.⁴ It appears, however, that most of the existing plans do not contain adequate specific measures to remove well-documented barriers to access to remedies.⁵ Consequently, States have thus far made little progress in providing effective remedial mechanisms to people adversely affected by business activities. Access to effective remedies, or

¹ Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 24.

² A/HRC/32/19, para. 6.

³ A/HRC/26/25, para. 41.

⁴ See www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf, pp. 31-36.

⁵ For example, International Corporate Accountability Roundtable and European Coalition for Corporate Justice, "Assessments of existing national action plans on business and human rights" (November 2015: update), pp. 4-5.

rather the lack thereof, has been a common theme in all the country visits conducted by the Working Group to date.⁶

5. With a view to overcoming the challenges faced by victims in gaining access to effective remedies, in 2014 the Office of the United Nations High Commissioner for Human Rights launched the Accountability and Remedy Project.⁷ The project has provided specific guidance to States in removing barriers to access to judicial remedies and in turn improving corporate accountability.⁸ In a similar vein, in March 2016, the Council of Europe, in paragraph 31 of its recommendation CM/Rec(2016)3 on human rights and business, listed steps that member States should take to ensure that everyone had access to an effective remedy. In April 2017, the European Union Agency for Fundamental Rights outlined 21 specific recommendations to lower barriers for access to remedy at the European Union level.⁹ The Working Group, in its report of June 2017, made recommendations on how to improve the effectiveness of cross-border cooperation between States with regard to law enforcement on the issue of business and human rights.¹⁰

B. Objectives

6. The Working Group seeks herein to achieve three interrelated objectives. First, it provides a brief clarification about the distinction between the “right to an effective remedy” and “access to an effective remedy” and discusses the relationship of these two concepts to access to justice and corporate accountability. This clarity should help in building a shared understanding around pillar III of the Guiding Principles.

7. Second, the Working Group invites stakeholders to give greater attention to the perspective of rights holders affected by business-related human rights abuses in construing what constitutes an effective remedy under the Guiding Principles. By keeping rights holders central to the entire remedy process, the Working Group proposes, in section III, elements that contribute to the effectiveness of remedies. The centrality of rights holders would, among other things, mean that remedial mechanisms are responsive to the diverse experiences and expectations of rights holders and that a bouquet of preventive, redressive and deterrent remedies is available to them.

8. Third, the Working Group outlines in section IV steps that States, businesses and civil society organizations should take to realize effective remedies for rights holders. The steps are proposed as part of the all roads to remedy approach. Access to effective remedy should be seen as an all-pervasive lens to inform all steps that States are expected to take as part of pillar I and businesses as part of pillar II.

C. Methodology

9. Given that the Guiding Principles are rooted in international human rights law, the Working Group draws on existing international human rights instruments and the work of treaty bodies and independent human rights experts. The topic of access to remedies has also received significant attention in decisions of regional human

⁶ See www.ohchr.org/EN/Issues/Business/Pages/WGCountryVisits.aspx.

⁷ See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

⁸ See A/HRC/32/19.

⁹ European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the EU Level: Opinion of the European Union Agency for Fundamental Rights* (Vienna, Publications Office of the European Union, 2017).

¹⁰ A/HRC/35/33.

rights courts, research reports and scholarly commentaries.¹¹ The Working Group taps into these existing rich sources of information to unpack what an effective remedy means under the Guiding Principles.

10. In addition to relying on the above primary and secondary sources, the Working Group has been informed by the experiences of rights holders and of civil society organizations and human rights defenders, who work closely with the affected communities, in seeking effective remedies in relation to business enterprises. These experiences were gathered during country visits and from consultations held in Geneva, London, New Delhi, Ottawa, Phnom Penh and Seoul. The Working Group also collected feedback from States and other stakeholders through a questionnaire.¹² The present report is built on input received through all these processes.

D. Scope and limitations

11. What amounts to an effective remedy depends on several objective and subjective elements. The Working Group elaborates herein the concept of access to effective remedies under pillar III of the Guiding Principles, irrespective of whether remedies are sought from a judicial or non-judicial mechanism, from the perspective of rights holders. Because of word limits, it focuses only on women's experiences and expectations in terms of access to effective remedies. Nevertheless, similar attention should be paid to the diverse experiences and expectations of other groups, including children, indigenous peoples, migrant workers, ethnic minorities, persons with disabilities and people with different sexual orientation, who are often marginalized or made vulnerable as a result of discriminatory policies, processes and practices.

12. Various elements of reparation, outlined herein as part of what may be termed a "bouquet of remedies", need more extensive elaboration. Similarly, the all roads to remedy approach also requires further development in a variety of contexts. For example, the role of intergovernmental organizations and international financial institutions in providing access to effective remedies should be articulated.

II. Conceptual clarifications with regard to remedy, justice and accountability

13. Several terms are used in international human rights instruments and in literature on business and human rights: right to an effective remedy, access to effective remedy, access to justice and corporate accountability. The interrelationship between these terms is often unclear. Most international human rights instruments, including the Universal Declaration of Human Rights (art. 8) and the International Covenant on Civil and Political Rights (art. 2) acknowledge the

¹¹ For example, Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 2006); Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable, CORE and European Coalition for Corporate Justice, 2013); Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (London, 2014); May Miller-Dawkins, Kate Macdonald and Shelley Marshall, "Beyond effectiveness criteria: the possibilities and limits of transnational non-judicial redress mechanisms" (2016); and Juan José Álvarez Rubio and Katerina Yiannibas, eds., *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Abingdon, Routledge, 2017).

¹² See www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx.

"right to an effective remedy", whereas some other international treaties mention "effective access to justice" (e.g., art. 13 of the Convention on the Rights of Persons with Disabilities). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law mention both the right to a remedy and access to justice, with the latter seen as part of a victim's right to remedies.¹³ The Guiding Principles and the Working Group's guidance contain references to both accountability and access to effective remedy, but without any explicit mention of the correlation between the two.

14. The right to an effective remedy is a human right with both procedural and substantive elements.¹⁴ It imposes a duty on States to respect, protect and fulfil this right. It also entails responsibility for non-State actors, including businesses, as articulated in the Guiding Principles and elaborated in section IV of the present report. To realize the right to an effective remedy, access to appropriate remedial mechanisms should be provided by the bearers of a duty or responsibility concerning this right. It can thus be said that the concept of access to effective remedies is derived from, and dependent on, the right to an effective remedy.

15. Nevertheless, merely providing access to remedial mechanisms will not suffice: there should be an effective remedy in practice at the end of the process. This is why access to an effective remedy as having "both procedural and substantive aspects" is recognized in the Guiding Principles.¹⁵ As duty bearers, States should, therefore, ensure that they put in place effective remedial mechanisms that can deliver effective remedies. Similarly, when a business enterprise provides remediation in cases in which it identifies that it has caused or contributed to adverse impacts, such remediation should be effective in terms of both process and outcome.

16. Access to justice, on the other hand, is a concept that is more elastic than the notions of the right to an effective remedy and access to an effective remedy. In a narrow sense, access to justice can be equated with the right or access to effective judicial remedies,¹⁶ and in this sense effective remedies should often result in justice being provided to rights holders. Nevertheless, access to justice can also be used in a broader sense to deal with larger issues of injustice that may not be addressed through individualized remedies offered for a given set of human rights abuses, but would require more fundamental changes in social, political or economic structures.

17. The right (or access) to an effective remedy has a close relationship with the notion of corporate accountability. If remedies for human rights abuses are construed holistically, as articulated herein, to address "both individual and societal goals",¹⁷ effective remedies should result in some form of corporate accountability. Conversely, corporate accountability should contribute to some form of remedies, which may or may not be effective. The starting point should therefore be to provide effective remedies to the victims of corporate human rights abuses, which in turn should inevitably result in corporate accountability.

¹³ The Basic Principles are set out in the annex to General Assembly resolution 60/147. See para. 11.

¹⁴ See, for example, article 6 of the Convention on the Elimination of All Forms of Racial Discrimination and resolution 60/147, annex.

¹⁵ See the commentary to Guiding Principle 25.

¹⁶ Francesco Francioni, ed., "The rights of access to justice under customary international law", in *Access to Justice as a Human Right* (New York and Oxford, Oxford University Press, 2007), pp. 3-4.

¹⁷ A/HRC/14/22, para. 12.

III. Centrality of rights holders in access to effective remedies

18. Human rights instruments, treaty bodies, experts and courts have developed elements to provide general guidance about what constitutes an effective remedy under international human rights law.¹⁸ These elements are also relevant to understanding access to effective remedies under the Guiding Principles.

19. Building on this existing corpus of guidance, the Working Group develops herein an overarching idea that rights holders should be central to the entire remedy process, including to the question of effectiveness. It is they who suffer harm owing to business-related human rights abuses. Any process to remedy such harm should therefore take both the rights holders and their suffering seriously, lest remedies not be regarded as effective by those whose opinion should matter the most.

20. The centrality of rights holders in access to effective remedies will entail several requirements, the first four of which are developed more fully below, while the other five are merely flagged owing to word limits. Many of these requirements can be linked, explicitly or implicitly, to the effectiveness criteria set out in Guiding Principle 31.¹⁹ First, remedial mechanisms and remedies should be responsive to the diverse experiences and expectations of rights holders.²⁰ Human rights are best advanced when the “experiences, perspectives, interests, and opinions [of the rights holders] deeply inform how remedy mechanisms are created and implemented”.²¹ Second, the key constitutive element of effectiveness, such as remedies being accessible, affordable, adequate and timely, should be determined with reference to the needs of rights holders seeking justice. Third, the affected rights holders should have no fear of victimization in the process of seeking remedies.²² Fourth, as noted in the commentary to Guiding Principle 25, a range of remedies should be available to rights holders affected by business-related human rights abuses.

21. Fifth, remedial mechanisms, whether judicial or non-judicial, should not treat rights holders merely as recipients of remedy. Rather, all mechanisms should be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms. Such engagement would ensure that remedial mechanisms and their processes are geared towards protecting and redressing the rights of communities affected by business-related human rights abuses.

22. Sixth, the effectiveness of a remedy should be judged also from the perspective of affected rights holders. It is “important to understand what those affected would view as an effective remedy”.²³ At the same time, it is possible that rights holders may develop low expectations as to the meaning of effective remedies because of social, economic and cultural conditions, the presence of barriers in gaining access to remedies, the lack of adequate or objective information, and other

¹⁸ See, for example, the Basic Principles and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

¹⁹ The Corporate Human Rights Benchmark also incorporates some of these elements for ranking corporations, for example measurement themes B.1.8, C.3, C.5 and F.C.4. See www.corporatebenchmark.org/sites/default/files/2017-03/CHRB_methodology_singles.pdf.

²⁰ Human Rights Committee, general comment No. 31, para. 15.

²¹ Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, “Righting wrongs?: Barrick Gold’s remedy mechanism for sexual violence in Papua New Guinea — key concerns and lessons learned” (2015), p. 44.

²² Commentary to Guiding Principle 31 (b); A/HRC/32/19, annex, para. 7.1.

²³ “OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector”, 12 June 2017, p. 13. Available from www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

power imbalances.²⁴ On the other hand, some affected communities may have unreasonable expectations of remedies. The effectiveness of remedies obtained should therefore be determined also with reference to an objective perspective of informed and empowered remedy seekers.

23. Seventh, if there is a power imbalance between the affected rights holders and a given enterprise facing allegations of human rights abuses,²⁵ persons administering a remedial mechanism should take proactive measures to redress this asymmetrical relationship.²⁶ This may involve relying on independent third parties, including civil society organizations or lawyers, to advise the rights holders and assist the mechanism in dealing with the complaint effectively.

24. Eighth, rights holders should have access to information about their rights, the duties of States and the responsibilities of businesses in relation to those rights, all available remedial mechanisms and trade-offs between mechanisms.²⁷ Such information, which should also partially address the power imbalance noted above, should be provided by the relevant States and business enterprises. Globally connected civil society organizations can also play a useful role in filling gaps in the flow or dissemination of information.

25. Ninth, access to effective remedies should be available without discrimination.²⁸ This duty is not merely negative in nature: rather, States should take appropriate affirmative action to provide access to effective remedies to marginalized or vulnerable groups.²⁹ In cases in which businesses have a responsibility to provide remediation through operational-level grievance mechanisms under the Guiding Principles, even they should consider adopting special measures to enable vulnerable people to have effective access to such mechanisms.

A. Sensitivity to diverse experiences of rights holders

26. Rights holders are not a homogenous group. Different groups of rights holders, in particular those living in vulnerable or marginalized situations, experience the impacts of business-related human rights abuses differently and may have varied expectations with regard to remedying the harm suffered.³⁰ These groups also face additional barriers in seeking access to effective remedies. States and business enterprises should therefore be sensitive to this diversity among rights holders to be able to provide effective remedies to all.³¹

27. Indigenous peoples, for example, have a special relationship with their ancestral land. Consequently, unlike other land owners, they may not find

²⁴ Benjamin Thompson, "Determining criteria to evaluate outcomes of businesses' provision of remedy: applying a human rights-based approach", *Business and Human Rights Journal*, vol. 2, No. 1 (Cambridge University Press, 2017), pp. 61-62.

²⁵ A/HRC/26/25, para. 37.

²⁶ See the commentary to Guiding Principle 31 (d).

²⁷ See Guiding Principles 31 (c) and 31 (d); Basic Principles, para. 11 (c).

²⁸ Castan Centre for Human Rights Law, Office of the United Nations High Commissioner for Human Rights and United Nations Global Compact Office, *Human Rights Translated 2.0: A Business Reference Guide* (Monash University, 2016), pp. 16 and 75-77.

²⁹ European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, p. 8.

³⁰ The experiences of right holders may vary even within a group. For example, a child with a disability may have different experiences to children without a disability.

³¹ Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 8.

compensation or even an offer of alternative land an effective remedy for forced displacement. Similarly, children experience the adverse impact of business operations in uniquely different ways: unlike adult workers, children working in factories will miss out on education and may experience physical or sexual abuse without even realizing it.³² The barriers experienced by children and their needs in terms of effective remedies too will differ from those of adults.³³

28. The Working Group will take women as an illustrative group to show how their experiences and expectations should inform the provision of effective remedies in all types of remedial mechanisms, in line with the Guiding Principles. Women's experiences should be relevant in three interrelated ways: how corporate activities may affect women differently, including by reinforcing or exacerbating existing gender discrimination by adopting gender-neutral policies; what additional barriers women may face in gaining access to effective remedies to redress human rights abuses; and what remedial responses women may need to achieve substantive justice in an era in which the private sector is playing a dominant role.

29. Women are underrepresented on corporate boards and in managerial positions in business enterprises, including State-owned enterprises. They are often found in the most precarious working environments, for example at the bottom of supply chains or in informal operations. Pregnancy-related questions at interview or mandatory pregnancy testing before hiring are indicative of women's degrading experiences of business-related human rights abuses. Large-scale development projects also tend to affect women more adversely than men. Given that women "are disproportionately represented among the poor"³⁴ and may not own property, they would inevitably face a disadvantage in gaining access to loans to launch a new business. Accordingly, if a gender lens is not applied to impact assessment (social, environmental or human rights) and the affected women are not meaningfully and directly involved in informed consultation processes, both States and businesses may be unable to capture the unique adverse impacts of business activities on women.³⁵

30. Women may also face additional barriers in gaining access to justice generally³⁶ and specifically in relation to corporate human rights abuses³⁷ because of discriminatory laws, gendered roles, economic marginalization, social stigma, power imbalances, religious values and cultural norms. Even if women do have access to remedial mechanisms, the dispute resolution process may lack gender sensitivity or compensation awarded may not reach them because of patriarchal social structures.

31. The above brief analysis shows how critical it is for both States and businesses to engage with women by applying a gender lens while implementing the Guiding Principles, including pillar III. For example, if businesses apply that lens in a cross-cutting manner, from making a policy commitment to carrying out all four stages of human rights due diligence and providing remediation, this should enable them not

³² See Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights.

³³ *Ibid.*, paras. 31 and 66-72.

³⁴ Guiding principles on extreme poverty and human rights (A/HRC/21/39), para. 23.

³⁵ See, for example, Amnesty International, "Out of sight, out of mind: gender, indigenous rights, and energy development in northeast British Columbia, Canada" (London, 2016); and "Gendered impacts: indigenous women and resource extraction — Kairos symposium executive summary", available from www.kairoscanada.org/wp-content/uploads/2015/05/KAIROS_ExecutiveSummary_GenderedImpacts.pdf.

³⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice, paras. 3, 8-10 and 13.

³⁷ Miller-Dawkins, Macdonald and Marshall, "Beyond effectiveness criteria", pp. 27-28.

only to understand better the impact of their operations on women but also to find ways to deal with discriminatory structural barriers experienced by women.³⁸

B. Accessible, affordable, adequate and timely remedies

32. It is generally accepted that remedies, to be effective, should be accessible, affordable, adequate and timely.³⁹ It is stressed in the Guiding Principles that all non-judicial grievance mechanisms should be "accessible" in a holistic sense, and the Working Group's guidance contains suggested ways to achieve this goal.⁴⁰ It is vital to construe these elements from the perspective of affected rights holders seeking remedies. For example, rights holders would consider a remedy to be accessible only if they know about its existence and could gain access to it without too much expense, inconvenience or the help of technical experts. Similarly, what may be regarded as an affordable remedy from a purely objective perspective might not be considered affordable by the actual affected communities.

33. Adequacy of remedies has several elements. If the remedy involves compensation, adequacy may be determined with reference to the quantum of compensation. This should generally work, but not always. For example, if a farmer's land is acquired for a development project, monetary compensation may not offer a perpetual source of livelihood and thus might not be regarded as an adequate remedy. The adequacy of remedies should also be judged by keeping in mind not only the current needs of the victims, but also their future long-term needs. Although the finality of agreed remedies is a legitimate goal, there should be some built-in flexibility to respond to harm discovered after the conclusion of compensation agreements.

34. To be effective, remedies should also be timely,⁴¹ given that justice delayed is often justice denied. What is timely will depend on, among other things, the complexity of a case, any transnational dimension, the number of affected people, the nature of the abuse, the type of remedy sought and the capacity of a given remedial mechanism. Nevertheless, what rights holders regard as timely should be an important consideration. For example, a person who is terminally ill as a result of exposure to hazardous substances or a single working mother who is wrongfully dismissed but has no alternative means to support her family would expect remedies more swiftly than other affected persons.

C. Freedom from fear of victimization in seeking remedies

35. If rights holders fear victimization in the process of seeking remedies for a human rights abuse, they may not be able to avail themselves of remedies in practice, even if those remedies appear to be effective on paper.⁴² The victimization may take many forms. Rights holders, including social activists and human rights defenders, may face intimidation, arrest, arbitrary detention, criminal defamation

³⁸ The Landesa case study of February 2017 about the Kilombero Sugar Company in the United Republic of Tanzania shows how vital gender sensitivity is for land-use planning, communication with affected women and equitable distribution of the benefits of sugar production. See www.landesa.org/wp-content/uploads/KSCL-Tanzania-Case-Study-FINAL.pdf.

³⁹ Basic Principles, para. 2 (c); Committee on Economic, Social and Cultural Rights, general comment No. 9 (1998) on the domestic application of the Covenant, para. 9.

⁴⁰ A/HRC/32/19, annex, paras. 15-16.

⁴¹ A/HRC/26/25, para. 44.

⁴² A/71/281, para. 51.

charges, enforced disappearance or even murder.⁴³ Rights holders seeking remedies may also be subject to a strategic lawsuit against public participation.⁴⁴ In 450 cases of attacks against human rights defenders tracked by the Business & Human Rights Resource Centre, judicial harassment has emerged as the most common tool of suppression (40 per cent of cases).⁴⁵

36. Freedom from fear of victimization in seeking remedies is an integral component of access to effective remedies, because no additional harm should be caused in the process of redressing the initial harm. States should therefore ensure that people and communities adversely affected by business activities face no inhibition in approaching remedial mechanisms.⁴⁶ Business enterprises should also play their part in cooperating with such efforts by States, including by ensuring that their action to defend corporate interests does not have “a chilling effect on the legitimate exercise of ... remedies” by affected people.⁴⁷

37. It is notable that, in paragraph 66 of the 2017 edition of the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, there is recognition that “any worker who, acting individually or jointly with other workers, considers that he or she has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result”. Future business and human rights frameworks, including national action plans to implement the Guiding Principles, should contain explicit recognition of a commitment to protect rights holders seeking remedies from victimization.

D. Bouquet of remedies

38. Rights holders affected by business-related human rights abuses should be able to seek, obtain and enforce a bouquet of remedies: a range of remedies depending upon varied circumstances, including the nature of the abuses and the personal preferences of rights holders. There are at least two key reasons why multiple remedies should be concurrently available to the affected persons and communities.

39. First, if the aim of remedies is “to place an aggrieved party in the same position as he or she would have been had no injury occurred”,⁴⁸ the injury experienced by the rights holders may not be recoupable by any one remedy. In the commentary to Guiding Principle 25, it is noted that remedy “may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition”. Different remedies may be more effective in different situations.

⁴³ For attacks against human rights defenders, see A/71/181, A/HRC/34/52 and www.business-humanrights.org/en/key-findings-from-the-database-of-attacks-on-human-rights-defenders-feb-2017. The killing of Berta Cáceres for defending the rights of indigenous peoples and the prosecution of Andy Hall for exposing business-related labour rights abuses are emblematic cases in this area.

⁴⁴ Ciara Dowd and Elodie Aba, “Why it’s getting harder (and more dangerous) to hold companies accountable”, 23 May 2017. Available from www.opendemocracy.net/openglobalrights/ciara-dowd-elodie-aba/why-it-s-getting-harder-and-more-dangerous-to-hold-companies-. On a positive note, some states or provinces in Australia, Canada and the United States of America have enacted legislation against strategic lawsuits against public participation.

⁴⁵ See https://business-humanrights.org/sites/default/files/documents/CLA_AB_Final_Apr%202017.pdf.

⁴⁶ Basic Principles, para. 10.

⁴⁷ Committee on Economic, Social and Cultural Rights, general comment No. 24, para. 44.

⁴⁸ Dinah Shelton, *Remedies in International Human Rights Law*, p. 10.

The ability of rights holders to choose and obtain a bouquet of remedies depending upon the unique circumstances of each case will therefore be a vital precondition for access to effective remedies.

40. Second, remedies for human rights abuses serve interrelated purposes under international human rights law,⁴⁹ not least because such abuses involve harm to affected individuals and collective societal interests. Remedies should, of course, be able to redress, insofar as possible, the harm caused by some business activities. Nevertheless, remedies also have a key role to play in pre-empting future abuses. Lastly, remedies should be able to discourage not only a given actor, but also others, from committing the same or similar abuses in the future. The idea of effective remedies should therefore combine preventive, redressive and deterrent elements. There is a vital interrelationship between these elements.⁵⁰ If effective preventive remedies are available, there should be little need to seek redressive remedies. Similarly, deterrent remedies will reduce the need to seek preventive and redressive remedies. Consequently, if any one of these elements is missing, it will undermine the overall effectiveness of remedies.

41. It is, however, likely that not all remedial mechanisms conceived in the Guiding Principles will be able to offer all three elements. Whereas State-based judicial mechanisms should be able to provide preventive, redressive and deterrent remedies, State-based non-judicial mechanisms and non-State-based grievance mechanisms may be able to offer only preventive and/or redressive remedies. For the overall efficacy of remedies within a State, it should suffice if all three elements are available to be employed.

42. The Inter-American Court of Human Rights has developed the concept of "full restitution", wherever possible, as reparation for damage caused by a breach of international human rights obligations.⁵¹ It has ordered innovative remedies, including amending or repealing laws incompatible with the American Convention on Human Rights, apologizing publicly, memorializing victims through monuments and street names and paying for victims' schooling.⁵² In the Basic Principles emphasis is laid on the need for "full and effective reparation" of the following five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁵³ Although these conceptions of remedies have been developed in different contexts, they provide a useful reference point to understand what would constitute an effective, including rights-compatible, remedy under the Guiding Principles.

1. Restitution

43. The aim of restitutionary remedies is to avoid unjust enrichment and restore the affected rights holders to the original position before the abuses occurred.⁵⁴ This may mean "to take something from the wrongdoer to which the victim is entitled and restore it to the victim".⁵⁵ In the context of business-related human rights abuses, this may take several forms: if a woman was dismissed from her job or denied a promotion because of her pregnancy, she should be reinstated or promoted to the position that she deserved; if an enterprise caused pollution, it should be required to restore the environment as part of the "polluter pays" principle.

⁴⁹ Ibid., pp. 10-16.

⁵⁰ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Abingdon, Routledge, 2012), pp. 47-50.

⁵¹ Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, Cambridge University Press, 2003), pp. 239-240.

⁵² Ibid., pp. 289-290.

⁵³ Para. 18. See also Human Rights Committee, general comment No. 31, para. 16.

⁵⁴ Basic Principles, para. 19.

⁵⁵ Dinah Shelton, *Remedies in International Human Rights Law*, p. 272.

44. Where restitution is sought by the victims of corporate human rights abuses and is feasible, this may provide a more effective remedy than compensation or even the incarceration of wrongdoers.

2. Compensation

45. A review of cases profiled by the Business & Human Rights Resource Centre shows that compensation is the most commonly sought and granted remedy for business-related human rights abuses.⁵⁶ While compensation often results as part of a civil process, in some cases courts may also award compensation as part of a fine imposed in criminal proceedings.⁵⁷ Victims may also obtain compensation through some institutionalized non-State-based grievance mechanism or an ad hoc private settlement of the dispute. Irrespective of the setting, the compensation received by the rights holders affected by business-related human rights abuses should be fair and proportional to the gravity of the harm suffered and never offered in lieu of potential criminal liability. Compensation should be awarded, as appropriate, for both pecuniary and non-pecuniary harm. The body awarding compensation should ensure that the affected rights holders do not receive inadequate compensation owing to lack of information or power imbalance.

46. Private compensation agreements to remedy human rights abuses that may also amount to crimes often raise complex issues about the appropriateness of private justice to settle public wrongs.⁵⁸ The confidential nature of these settlements reached between businesses and affected communities adds further complexity to the issue, especially because of information asymmetries and power imbalances between parties. While confidentiality may have both advantages and disadvantages, it is vital that confidentiality facilitate rather than undermine access to effective remedies. At least three considerations should be relevant here. First, the affected persons and communities should be provided with adequate and objective information about all aspects of the agreements, including the implications of confidentiality and legal waiver, if any. Such access to information should enable the affected people to take informed decisions. Second, in cases in which an agreement is signed by a representative on behalf of an affected community, confidentiality should not prevent the flow of information within the community about the process and the content of the agreement. Third, even if a settlement agreement is generally confidential, its non-sensitive parts should be released into the public domain to enable the dissemination of good practice as a reference point for subsequent agreements.

47. Compensation may also serve a deterrent purpose in appropriate cases pertaining to business-related human rights abuses. The Supreme Court of India, for example, has held that, if an enterprise is engaged in a hazardous or inherently dangerous industry, "the measure of compensation ... must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect".⁵⁹ Similarly, if there is evidence of a business enterprise profiting from wilful, malicious, repeated or systematic human rights abuses, there may be a

⁵⁶ See <https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled>.

⁵⁷ It is suggested that the civil process to obtain compensation may also be embedded within criminal proceedings; European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, pp. 11-12.

⁵⁸ Francesco Francioni, ed., "The rights of access to justice under customary international law", in *Access to Justice as a Human Right*, pp. 4-5.

⁵⁹ See *M.C. Mehta v. Union of India*, AIR, 1987 SC 1086, 1099-1100.

case to award punitive or exemplary compensation to send a clear deterrent message.⁶⁰

3. Rehabilitation

48. In addition to providing restitution and compensation to the rights holders affected by business-related human rights abuses, rehabilitation can be a vital remedy in many situations. For example, if people are displaced from their land because of an infrastructure project or the construction of a dam, only a provision for a suitable alternative piece of land may offer an effective remedy, because land can support livelihood for generations. On the other hand, a woman who suffered sexual violence linked to business operations may need psychological counselling and assistance to overcome trauma, and a worker injured in a factory may need vocational training to develop the skills required to take on another appropriate job. In such situations, the affected rights holders may need a range of rehabilitative care with independent oversight of overimplementation.

49. A holistic conception of rehabilitative remedies, which encompasses "all sets of processes and services ... to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as far as possible, the harm that has been suffered",⁶¹ should be employed in the context of business-related human rights abuses. It is in this context that one can see the recommendation of the Committee on the Rights of the Child that "States should provide medical and psychological assistance, legal support and measures of rehabilitation to children who are victims of abuse and violence caused or contributed to by business actors".⁶²

4. Satisfaction

50. Satisfaction can take multiple forms, from cessation of a continued human rights abuse to finding the truth, public apology and civil, administrative or criminal sanctions against the wrongdoers.⁶³ Giving direction to the State and/or a business enterprise to immediately stop alleged human rights abuses can be a powerful remedy. Moreover, a fact-finding inquiry to ascertain who caused human rights abuses (e.g., forced disappearance or killing of human rights activists) may assist in healing the emotional or psychological injury of the victims or survivors.

51. The rights holders affected by business-related human rights abuses often regard a genuine and meaningful public apology as a vital remedy to partly restore what cannot be compensated by money. Some business enterprises may hesitate to apologize, however, for fear that their having done so may subsequently be used to pursue legal claims. It may therefore be desirable to enact suitable apology laws that encourage businesses to offer meaningful apologies, but do not shield them from genuine legal action.

52. States should have effective judicial mechanisms in place to impose a range of sanctions against business enterprises as part of reparatory satisfaction. Sanctions may include fines, confiscation of assets, prosecution of corporate executives, suspension or termination of licences, exclusion from participating in public

⁶⁰ Dinah Shelton, *Remedies in International Human Rights Law*, pp. 356-358.

⁶¹ Clara Sandoval Villalba, "Rehabilitation as a form of reparation under international law" (Redress Trust, London, 2009), p. 10.

⁶² Committee on the Rights of the Child, general comment No. 16, para. 31.

⁶³ Basic Principles, para. 22.

procurement processes and community service orders.⁶⁴ It is also critical that States end impunity for corporate crimes by investigating and prosecuting offences.⁶⁵

5. Guarantees of non-repetition

53. It is critical that States and business enterprises learn lessons from past instances of human rights abuses and take steps to avoid any replication of similar abuses at the same or other sites in future. Guarantees of non-repetition can be a useful forward-looking tool in this context, both in avoiding a repeat of specific abuses and in preventing business-related human rights abuses generally. These interrelated goals can be accomplished in diverse ways, such as by inserting appropriate clauses in business contracts or settlement agreements, raising awareness about integrating human rights norms into business operations, introducing compliance programmes, undertaking effective criminal prosecutions of perpetrators and introducing legal reforms to plug regulatory gaps. The Committee on the Rights of the Child has recommended that States “guarantee non-recurrence of abuse through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned”.⁶⁶

6. Other preventive remedies

54. Except for guarantees of non-repetition, the above-mentioned forms of reparation are mostly redressive or deterrent in nature. As noted above, however, preventive remedies, which may be provisional or interim in nature, also have a critical role to play in the overall scheme of effective remedies. An injunction, for example, is a tool that could be used to pre-empt business-related human rights abuses if there is prima facie evidence of potential harm. If there is a legal basis, the rights holders should also be able to seek an order requiring a business enterprise to conduct a meaningful consultation with the affected community or conduct proper human rights due diligence. For example, a new French law requires some types of corporations to develop, disclose and implement a “vigilance plan”, meaning that a person with locus standi may obtain an order requiring a corporation to establish the plan, ensure its publication and account for its effective implementation. Such a remedy should prevent business-related human rights abuses from occurring in the first place.

IV. All roads to remedy

55. Ensuring access to effective remedies for business-related human rights abuses will require transformative changes in laws, policies, remedial mechanisms, societal structures and global governance. A good starting point would be to remove well-known legal, practical, procedural and jurisdictional barriers to gaining access to judicial and non-judicial mechanisms. The guidance of the United Nations High Commissioner for Human Rights and the opinion of the European Union Agency for Fundamental Rights provide specific guidance to States on how to minimize barriers to access to judicial remedies. To implement the High Commissioner’s guidance,

⁶⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), “Accountability and remedy project: illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse”, companion document to A/HRC/32/19 and Add.1, July 2016, pp. 20-21; European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, pp. 41-45.

⁶⁵ See A/HRC/35/33 and www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf.

⁶⁶ Committee on the Rights of the Child, general comment No. 16, para. 31.

States should develop “a comprehensive strategy ... as part of national action plans on business and human rights, and/or as part of strategies to improve access to justice generally”.⁶⁷

56. To complement these reform proposals, the Working Group outlines herein the all roads to remedy approach to realizing effective remedies for rights holders affected by business-related human rights abuses. Three components of the approach are discussed below: access to effective remedy should be taken as an all-pervasive lens; diverse actors should work individually and collectively towards the common goal of providing access to effective remedies; and remedies should be realized in diverse settings.

A. Access to effective remedy as an all-pervasive lens

57. There is a tendency to consider access to remedy as solely a pillar III issue. Nevertheless, considering that it is stated in the Guiding Principles that they are to be understood as “a coherent whole”, access to effective remedies should be regarded as a common thread running through all three interconnected and interdependent pillars.⁶⁸ Whatever action is taken by States as part of pillar I and by business enterprises as part of pillar II would have some positive or negative bearing on access to effective remedies under pillar III. Accordingly, rather than being taken as an afterthought after pillars I and II fail to deliver, access to effective remedy should be treated as a lens that pervades all aspects of the business and human rights discourse.

58. A few examples can be given to illustrate how access to effective remedy as a lens would work in practice. When States set out, under Guiding Principle 2, “the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”, this should include what is expected of businesses in providing for or cooperating in remediation of adverse human rights impacts. States are also expected, under Guiding Principle 3, to ensure that corporate laws “do not constrain but enable business respect for human rights”. A review and reform of corporate laws should, among other things, consider how to ensure that the principles of separate legal personality and limited liability do not pose undue barriers to gaining access to effective remedies. Similarly, when States seek to ensure policy coherence under Guiding Principles 8 to 10, they should not be oblivious of the impact of these issues — for example, of international investment agreements — on access to effective remedies.

59. Businesses too should consider access to effective remedy as a lens to discharge their responsibilities under pillar II. For example, the content of a policy commitment made by an enterprise under Guiding Principle 16, in addition to the four-stage process of human rights due diligence under Guiding Principles 17 to 21, should be conducive to facilitating access to effective remedies. Similarly, if an enterprise has put in place a grievance mechanism, the information about its working should be disclosed to stakeholders as part of pillar II communication, or under a statutory requirement such as the Modern Slavery Act (2015) in the United Kingdom of Great Britain and Northern Ireland. If the goal is to eradicate modern slavery from the entire supply chain, then ways and mechanisms to provide access to effective remedies should be an integral part of steps taken by business enterprises to achieve that goal. This may not yet be happening sufficiently. Of 60 companies analysed by KnowTheChain in 2016 about the transparency of their

⁶⁷ A/HRC/32/19, para. 31 (b).

⁶⁸ See Guiding Principles 1, 22 and 25.

efforts to eradicate forced labour from their global supply chains, only 7 have a process in place to respond to complaints.⁶⁹

B. Role of diverse players

60. Realizing effective remedies in the field of business and human rights will require several key players to take concerted action. The Working Group discusses herein the role of three such players (States, business enterprises and civil society organizations/human rights defenders), although the all roads to remedy approach implies that every player in the business and human rights field should contribute to realizing effective remedies.

1. States

61. States have an obligation, under national law and international human rights law, to ensure that people and communities affected by business-related human rights abuses have access to effective remedies. This obligation is both individual and joint for two reasons. The first is normative: realizing human rights is a shared goal agreed upon by the international community and States have pledged to work together collaboratively to achieve it.⁷⁰ The second is practical: considering the current nature of globally interconnected business operations, including through supply chains, it will be difficult to provide effective remedies solely within strict territorial compartments.

62. In addition to removing barriers to access to effective remedies at the national level, States have a duty to cooperate and collaborate with their peers to plug gaps in victims' quests to seek effective remedies against business enterprises,⁷¹ including State-owned or State-controlled enterprises. As the Working Group noted in its recent report, however, "to date, there has been little progress in cross-border cooperation that has led to successful law enforcement action in cases focused on business-related human rights abuses".⁷² States should therefore do more to develop an institutionalized approach of cooperation and collaboration to deal with all business-related human rights abuses with a transnational dimension. Such an approach can take several forms, such as developing a regional or international framework⁷³ or negotiating bilateral mutual assistance agreements.⁷⁴ Close cooperation and coordination among States will not only fill remedy gaps in the event of corporate human rights abuses but also avoid a multiplicity of processes to seek remedies.

63. Remedies will often be more effective if they are offered closer to victims. States should therefore also take proactive measures to build the capacity of judicial and non-judicial mechanisms to impart effective remedies. Moreover, information and legal aid may be provided to affected communities to seek appropriate remedies.

64. As part of their extraterritorial obligation to respect, protect and fulfil human rights, States should provide access to effective remedies even to foreign victims in

⁶⁹ See https://knowthechain.org/wp-content/uploads/KTC_CrossSectoralFindings_Final.pdf, p. 23.

⁷⁰ See Articles 55 and 56 of the Charter of the United Nations.

⁷¹ Skinner, McCorquodale and De Schutter, *The Third Pillar*, p. 26.

⁷² A/HRC/35/33, para. 4.

⁷³ Committee on Economic, Social and Cultural Rights, general comment No. 24, para. 35.

⁷⁴ A/HRC/35/33, para. 93. The corporate social responsibility memorandum of understanding signed by Sweden with other States can be one of such vehicles of cooperation. See www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf, p. 21.

appropriate cases.⁷⁵ Doing so will be consistent with States signalling to enterprises “domiciled in their territory and/or jurisdiction” to “respect human rights throughout their operations”.⁷⁶ The Committee on the Rights of the Child has noted that the obligations of States to protect the rights of children extend beyond their territorial boundaries.⁷⁷ This was recently reiterated by the Committee on Economic, Social and Cultural Rights.⁷⁸ States act extraterritorially in many areas within the parameters of international law and there are no sound reasons why they should hesitate to do so in the field of business and human rights. The Danish national action plan, for example, contains reference to the Government’s commitment to actively promoting the discussion on extraterritorial regulation with a view to finding “joint solutions”, encouraging the Council of Europe to take the lead on this matter.⁷⁹

2. Business enterprises

65. Business enterprises have an independent but complementary role to play in realizing effective remedies. They have four remedy-related responsibilities flowing from pillars II and III of the Guiding Principles. First, a combined reading of Guiding Principles 11 and 12 makes it clear that all business enterprises have a responsibility to respect all “internationally recognized human rights”. This includes the right to an effective remedy recognized in the Universal Declaration of Human Rights (art. 8) and the International Covenant on Civil and Political Rights (art. 2 (3)). In other words, businesses should not cause, contribute to or be directly linked to an adverse impact on the right to an effective remedy, that is, taking any action that “removes or reduces the ability of an individual to enjoy” this right.⁸⁰

66. The responsibility to respect the right to an effective remedy should be kept in mind by business enterprises while putting in place policies (e.g., making a policy commitment to respect human rights under Guiding Principle 16) and processes (e.g., conducting human rights due diligence under Guiding Principles 17 to 21) appropriate to their size and circumstances. Doing so would allow businesses to use access to effective remedy as a lens to guide everything that they are expected to do under the Guiding Principles.

67. Second, where “business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”.⁸¹ This responsibility is triggered only if an enterprise itself identifies that it has caused or contributed to an adverse human right impact. Such an identification may result “through its human rights due diligence process or other means”.⁸² The residual category of “other means” may include input received from stakeholders or through an operational-level grievance mechanism.⁸³ It may also include information that is part of complaints submitted to judicial or non-judicial remedial mechanisms.

⁷⁵ European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, pp. 26-29.

⁷⁶ See Guiding Principle 2.

⁷⁷ Committee on the Rights of the Child, general comment No. 16, paras. 38-43.

⁷⁸ Committee on Economic, Social and Cultural Rights, general comment No. 24.

⁷⁹ See www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf, p. 15.

⁸⁰ OHCHR, “The corporate responsibility to respect human rights: an interpretive guide” (New York and Geneva, 2012), p. 15.

⁸¹ See Guiding Principle 22.

⁸² See the commentary to Guiding Principle 22.

⁸³ OHCHR, “The corporate responsibility to respect human rights”, p. 63.

68. The responsibility of businesses to “cooperate” with “legitimate processes” to remedy adverse human rights impacts that they have caused or contributed to is also a key component of Guiding Principle 22, as affected communities seek remedies through a range of judicial or non-judicial grievance mechanisms. A recent addition to the existing options is company-union dialogue created under the 2017 edition of the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.⁸⁴ As part of their responsibility to respect human rights, business enterprises should, in good faith, not only participate in all such legitimate processes, but also comply with their remedial decisions. Attempts to limit the scope of existing remedies⁸⁵ or targeting affected communities with strategic lawsuits against public participation may also be regarded as inconsistent with the responsibility to “cooperate” with legitimate processes aimed at obtaining effective remedies.

69. If a business enterprise is merely “directly linked” to an adverse human rights impact through its operations, products or services by a business relationship, the enterprise itself is not required to provide for remediation, although it may take a role in doing so.⁸⁶ Nevertheless, the enterprise should still use its leverage to prevent and mitigate such an adverse impact.⁸⁷ In addition, as noted below, the responsibility of business enterprises to “establish or participate in effective operational-level grievance mechanisms” under Guiding Principle 29 is engaged in all types of adverse human rights impacts, including direct linkage impacts.

70. Third, if adverse human rights impacts may result in “irremediable” harm,⁸⁸ business enterprises should take proactive measures to prevent or mitigate such harm, rather than continuing business as usual with a mindset of subsequently paying compensation to redress the harm. This preventive remedial responsibility will be particularly relevant where, for example, exposure of workers to hazardous chemicals may result in irreversible health conditions, pollutants from a plant may destroy rare wildlife or industrial activities may have a significant impact on climate change.

71. Fourth, as indicated in Guiding Principle 29, “business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted”. In addition to helping businesses to identify systematic human rights problems on the basis of an analysis of complaint patterns,⁸⁹ such mechanisms may allow grievances to be remediated early, harmoniously and cost-effectively. It is critical, however, that operational-level grievance mechanisms satisfy all effectiveness criteria stipulated in Guiding Principle 31 and never be used, directly or indirectly, to preclude access to other judicial or non-judicial remedial mechanisms,⁹⁰ lest they be unable to gain the trust of affected communities or provide effective remedies, thus undermining the very purpose of having such mechanisms.

⁸⁴ See annex II and paras. 65-66 for further information.

⁸⁵ See, for example, the questions posed by John Ruggie regarding Shell’s arguments in the *Kiobel* case. John G. Ruggie, “Kiobel and corporate social responsibility”, issues brief (Cambridge, Massachusetts, John F. Kennedy School of Government at Harvard University, 2012), p. 6. Available from www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY.pdf.

⁸⁶ See the commentary to Guiding Principle 22.

⁸⁷ See Guiding Principle 19.

⁸⁸ See Guiding Principle 24.

⁸⁹ See the commentary to Guiding Principle 29.

⁹⁰ *Ibid.*

3. Civil society organizations and human rights defenders

72. Civil society organizations and human rights defenders have a critical role to play in facilitating access to effective remedies. They are often “justice enablers” for the victims of corporate human rights abuses. They raise awareness of rights and available remedies, build the capacity of rights holders, address power imbalances, advocate pro-human rights reforms, contribute to human rights impact assessment processes, assist in documenting harm and collecting evidence, develop standards, highlight abuses, undertake fact-finding, provide counselling to victims, assist in litigation and monitor compliance with remedial orders. Their role becomes more critical when States are unwilling or unable to discharge their human rights obligations, including because of the alleged corporate capture of government agencies.

73. Considering the multifaceted role of civil society organizations and human rights defenders, States should safeguard the civic space of these actors⁹¹ and treat them as critical allies in realizing human rights. As an example of good practice, the Government of Canada has developed new guidelines to protect human rights defenders.⁹² The updated national action plan of the United Kingdom also records the Government’s commitment “to promote protection of human rights defenders active on business and human rights related issues”.⁹³ Nevertheless, merely defending human rights defenders may not be enough: States should also provide resources to civil society organizations and human rights defenders and build their capacity so that they can discharge their functions effectively and independently.

74. In addition to States, businesses should play their part in creating a safe operating environment for civil society organizations.⁹⁴ The reason is simple: in the absence of a meaningful contribution from civil society organizations and human rights defenders, business enterprises may struggle to “identify and assess any actual or potential adverse human rights impacts with which they may be involved”.⁹⁵ Partnership with civil society organizations would also be critical for businesses to operate in weak governance zones. It appears that at least some corporations and business associations have begun to realize what may be termed the “moral-cum-market” hazards of remaining silent amid attacks on human rights defenders and begun to speak out against such persecution.⁹⁶

C. Locating remedies in diverse settings

75. The all roads to remedy approach also means that effective remedies for business-related human rights abuses could be sought in diverse settings, including consumer courts, labour tribunals and environmental courts, and that the negative impact of other parallel regimes and processes, including dispute settlement under trade or investment agreements, on access to effective remedies under the Guiding

⁹¹ Committee on the Rights of the Child, general comment No. 16, para. 84.

⁹² See http://international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

⁹³ See www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf, p. 22.

⁹⁴ The Working Group aims to develop guidance about the responsibility of business in relation to human rights defenders. See www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx.

⁹⁵ See Guiding Principle 18.

⁹⁶ See, for example, the statement by Adidas, available from www.adidas-group.com/media/filer_public/f0/c5/f0c582a9-506d-4b12-85cf-bd4584f68574/adidas_group_and_human_rights_defenders_2016.pdf.

Principles is managed. The Working Group briefly considers the second situation to illustrate this point.

76. In the past two decades, thousands of investment agreements (mostly bilateral) have been negotiated. Their predominant focus on protecting investors' rights coupled with their insular investor-State dispute settlement process not only constrains the regulatory space available to a State to protect and fulfil the human rights of its people, but also limits the opportunities to seek effective remedies for business-related human rights abuses.⁹⁷ Investors, although not party to these agreements, are able to sue the relevant State to protect their commercial interests, but States or the affected communities cannot generally bring an action against an investor under these agreements for alleged human rights abuses linked to an investment project.

77. In line with Guiding Principle 9, steps should be taken to address this asymmetrical situation between the rights and obligations of investors.⁹⁸ States should conduct an inclusive and transparent human rights impact assessment before concluding trade-investment agreements and insert explicit substantive human rights provisions in those agreements to preserve adequate policy space to discharge their human rights obligations.⁹⁹

78. A "reconfiguration" of investment agreements to impose explicit human rights obligations on investors, including an obligation to provide or participate in effective remedies for human rights abuses,¹⁰⁰ can take place in multiple ways. For example, States can require "that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements".¹⁰¹ Investment agreements may also contain a provision subjecting investors to legal action before courts in the host State for human rights abuses linked to the investment.¹⁰² Moreover, it is possible to incorporate the "clean hands" doctrine into investment agreements: non-compliance with human rights provisions will disentitle the investor to claim benefits under an investment treaty.

V. Conclusions and recommendations

A. Conclusions

79. **The right to an effective remedy is a human right widely recognized under international human rights law and national laws. Access to effective remedies is a response to realize that right. Both concepts have procedural and substantive elements. Effectiveness of remedies concerns process as well as**

⁹⁷ See <http://ccsi.columbia.edu/files/2016/11/Workshop-on-International-Investment-and-the-Rights-of-Indigenous-Peoples-Outcome-Documents-November-2016.pdf>, pp. 6-9.

⁹⁸ See United Nations Conference on Trade and Development, "Investment policy framework for sustainable development" (2015) and www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html.

⁹⁹ See, for example, the commitment made in the Swedish national action plan, available from www.government.se/4a84f5/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf, p. 29.

¹⁰⁰ Barnali Choudhury, "Spinning straw into gold: incorporating the business and human rights agenda into international investment agreements", *University of Pennsylvania Journal of International Law*, vol. 38, No. 2 (2017), p. 425. See also *Urbaser S.A. v. Argentina*, ICSID case No. ARB/07/26.

¹⁰¹ Committee on Economic, Social and Cultural Rights, general comment No. 24, para. 13.

¹⁰² Draft model text for the Indian Bilateral Investment Treaty, art. 13.

outcome: the rights holders will not be satisfied without an effective remedy at the end of an effective remedial process. If remedial mechanisms consistently fail to offer effective remedies, they are likely to lose the trust of rights holders.

80. The concept of effective remedies is closely connected to the idea of corporate accountability. Effective remedies for business-related human rights abuses, taken in a holistic sense to fulfil individual and societal goals, should result in some form of corporate accountability and vice versa.

81. Rights holders should be central to the entire remedy process. Such centrality would, among other elements, mean that remedial mechanisms are responsive to the diverse experiences and expectations of rights holders; that remedies are accessible, affordable, adequate and timely from the perspective of those seeking them; that the affected rights holders are not victimized when seeking remedies; and that a bouquet of preventive, redressive and deterrent remedies is available for each business-related human rights abuse.

82. Unless States and businesses are sensitive to how different groups of rights holders, including women, experience adverse human rights impacts differently and may have unique remedial expectations, they will be unable to provide them with effective remedies.

83. Notwithstanding the awareness of well-documented barriers to access to effective remedies and the availability of specific guidance to overcome those barriers, the existing national action plans are generally very weak in terms of the implementation of pillar III. Obtaining effective remedies in the event of business-related human rights abuses therefore remains an exception rather than the rule.

84. In addition to generating political will, a fundamental shift towards the remedy pillar is required. The Working Group proposes the all roads to remedy approach: access to effective remedies, including preventive remedies, should be seen as an all-pervasive lens that should guide all action on the part of States and businesses under the Guiding Principles. Civil society organizations and human rights defenders too have a key role to play in realizing effective remedies. It is, however, rather worrying that the civic space for these players is shrinking almost everywhere.

85. The all roads to remedy approach also implies that remedies for business-related human rights abuses should be located in diverse settings. Investment agreements and their dispute settlement system are one clear candidate requiring changes to ensure that the rights of investors do not trump human rights.

B. Recommendations

86. The Working Group recommends that States:

(a) Maintain the centrality of right holders to the entire remedy process by ensuring that all remedial mechanisms are responsive to the diverse experiences and expectations of rights holders, especially marginalized or vulnerable groups;

(b) Apply a gender lens in implementing the Guiding Principles, including pillar III, to ensure that businesses do not perpetuate or exacerbate existing discrimination against women;

(c) Offer a bouquet of preventive, redressive and deterrent remedies to make good any harm caused to rights holders by business-related human rights

abuses and ensure that remedies are accessible, affordable, adequate and timely from the perspective of affected rights holders;

(d) Take proactive measures to address power imbalances between businesses and the affected rights holders, including by providing the latter with accessible information about their rights and remedial mechanisms;

(e) Avoid criminalizing peaceful protests and ensure that rights holders and human rights defenders are not victimized while seeking legitimate remedies;

(f) Pay attention to effective remedies when fulfilling the duty to protect human rights, which entails establishing effective judicial and non-judicial remedial mechanisms capable of providing effective remedies in practice;

(g) Independently assess national remedial mechanisms, pay greater attention to forward-looking action concerning pillar III in national action plans to implement the Guiding Principles and remove barriers to access to all types of remedy, including by following the High Commissioner's guidance and the recommendations made in the Working Group's reports;

(h) Cooperate and collaborate with other States to provide more effective remedies locally and extraterritorially for all business-related human rights abuses;

(i) Embed human rights explicitly in all trade or investment agreements to preserve regulatory space and require investors to comply with all applicable national and international human rights norms;

(j) Encourage businesses to establish effective operational-level grievance mechanisms to complement State-based judicial and non-judicial mechanisms;

(k) Create a conducive environment for civil society organizations working to enhance access to remedies and strengthen corporate accountability.

87. The Working Group recommends that business enterprises:

(a) Respect the right to an effective remedy by not taking action that would remove or reduce the ability of an individual or community to enjoy that right;

(b) Understand the concept of effective remedies in a broad sense to include a range of preventive, redressive and deterrent remedies, rather than merely payment of compensation;

(c) Keep the diverse experiences and expectations of different groups of rights holders in mind when providing access to effective remedies;

(d) Establish, in meaningful consultation with affected communities, operational-level grievance mechanisms that are effective in terms of process and remedial outcomes;

(e) Adopt a gender lens to discharge their responsibilities under pillars II and III and embed access to effective remedies in their policy commitments and human rights due diligence processes;

(f) Cooperate in good faith with all legitimate processes aimed at providing effective remedies for business-related human rights abuses and implement remedial orders of such bodies;

(g) Take proactive measures to prevent or mitigate those adverse human rights impacts that may result in irremediable harm;

(h) Support States' efforts and encourage States to safeguard civil society organizations and human rights defenders from victimization for seeking remedies.

88. The Working Group recommends that civil society organizations and human rights defenders:

(a) Continue to play the role of "justice enablers" in the event of business-related human rights abuses, including by empowering affected individuals and communities and addressing current power imbalances;

(b) Highlight to States and businesses the diverse experiences and expectations of vulnerable or marginalized groups concerning access to effective remedies;

(c) Advocate legal and policy reforms that States should initiate to remove barriers to access to effective judicial and non-judicial remedies;

(d) Forge national coalitions and global networks to share information about the effectiveness of remedies and strategies concerning corporate accountability.